# 2002-2003 BTG FEDERAL UPDATE
Cases since Outline Submitted

## I. CIVIL LITIGATION AND PROCEDURE

### A. Jurisdiction

1. Roell v. Withrow, ___ S. Ct. ___, 2003 WL 1960602 (April 29, 2003). Consent to magistrate judge pursuant to 28 U.S.C. § 636(c) may be implied from conduct of party during litigation. Note the vote on this case was five to four, with the dissenters voting for express written consent as the "clear and unambiguous indication that the party [consenting] had sufficient notice it was freely waiving its right [to trial by an Article II judge]."

2. Epps v. Stewart Information Services Corp., __ F.3d _____, 2003 WL 1699904 (8th Cir. April 1, 2003). There was no personal jurisdiction over Delaware holding corporation through its wholly-owned subsidiary located in Arkansas -- "mere ownership ... [was] too distant and limited a contact with Arkansas" in the absence of any other contacts which would support a finding of personal jurisdiction, i.e., that subsidiary is acting as alter ego for parent.

### B. Procedure

1. Dole Food Co. v. Patrickson, ___ S. Ct. ___, 2003 WL 1906158 (April 22, 2003). An impleaded defendant to a products liability case argued it qualified as an instrumentality of a foreign state (here Israel) in support of removal jurisdiction under 28 U.S.C. §§ 1441(a), 1603(a). However, the record demonstrated Israel only owned other companies which in turn owned a majority of shares of the stock of the impleaded defendant. The Supreme Court held "only direct ownership" will satisfy the statutory requirement.

2. Jinks v. Richland Co., ____ S. Ct. ____, 2003 WL 1906299 (April 22, 2003). This case provides a federal practice reminder: under 28 U.S.C. § 1367 a federal court may exercise supplemental jurisdiction over non-federal claims brought in conjunction with federal claims. If the federal claims are dismissed, § 1367(d) contains a tolling provision with respect to state law claims which tolls a state limitations period while the claims are pending in federal court plus thirty days (unless a state limitation is longer). A constitutional challenge to application of this tolling provision to state law claims against a state political subdivision was unsuccessful -- the Court held § 1367(d) does not violate principles of state sovereignty.

3. Fletcher v. Conoco Pipe Line Co., 323 F.3d 661 (8th Cir. 2003). Judge was not required to recuse himself *sua sponte* where attorney who had represented plaintiffs in other cases (and who had a long-time personal and business relationship with judge) was only a fact witness in case pending in front of judge and attorney never filed appearance; motion to strike attorney's affidavit (offered in summary judgment proceedings) was denied; judge's ruling against plaintiffs failed to raise inference of bias in their favor.

4. MHC Investment Co. v. Racom Corp., 323 F.3d 620 (8th Cir. 2003). The court affirms a sua sponte imposition of Rule 11 sanctions for pursuing frivolous defenses.

5. U.S. Xpress Enterprises, Inc. v. J.B. Hunt Transport, Inc., 320 F.3d 809 (8th Cir. 2003). In the context of a civil Batson challenge to defendant's peremptory jury strike of the remaining African-American panel member (plaintiff was African-American), although trial judge did not articulate on the record his "step three" analysis concerning proof of purposeful discrimination, record showed defendant's race-neutral reason for striking the juror was a characteristic shared by white panel members who were not stricken, therefore, trial court's determination juror could not be struck was supported by the record evidence.

6. Rustenhaven v. American Airlines, Inc., 320 F.3d 802 (8th Cir. 2003). In another case arising from June 1999 airplane crash during a thunderstorm, verdict for loss of consortium damages in the amount of $2 million was excessive under Arkansas' "shock-the-conscience" standard and was remitted to $500,000 on appeal; compensatory damages award of $4,242,000 to crash victim exceeded "outer limit" of award and was remitted to $3,242,000 -- rejection of either remittitur would require new trial.

C. Evidence

1. Sosna v. Binnington, 321 F.3d 742 (8th Cir. 2003). Physician expert's proposed testimony on cross-examination regarding his personal treatment practices were not relevant to standard of care in medical malpractice case and thus were properly excluded, particularly where theory of liability was not based on any of the practices.

D. Remedies

1. State Farm Mut. Auto. Ins. Co. v. Campbell, ___ U.S. ___, 123 S. Ct. 1513 (2003). Punitive damages award of $145 million for $1 million in compensatory damages is excessive and violates Due Process. While the manner in which State Farm handled claims against its insureds in this case was far from laudable, punishment based on evidence of State Farm's operations throughout the country and conduct in other cases outside the trial state (which came into the trial record) went beyond the legitimate objectives of punitive damages.

II. CRIMINAL LAW

A. Criminal Acts

1. Virginia v. Black, ____ U.S. ____, 123 S. Ct. 1536 (2003). A state statute which bans cross burning carried out with the intent to intimidate is not inconsistent with the First Amendment; however, a provision of the statute which indicated any such burning was prima facie evidence of that intent was unconstitutional on its face.

2. United States v. Kuenstler, ___ F.3d ___, 2003 WL 1873308 (8th Cir. April 15, 2003). Intent to distribute was supported by discovery of 0.47 grams of methamphetamine in defendant's truck where the quantity was divided into individual packages and found with other packaging material and coded drug records.

3. United States v. Hatcher, 323 F.3d 666 (8th Cir. 2003). Proof that jewelry stores purchased inventory from out-of-state vendors was sufficient to satisfy interstate commerce element of armed robbery counts. Also of note in this case, prison recordings of conversations between attorneys and cooperating co-conspirators, taped with their knowledge, were not protected by attorney-client privilege -- knowledge of presence of recorder was "functional equivalent of the presence of a third party."

4. United States v. Fletcher, 322 F.3d 508 (8th Cir. 2003). In case involving conviction for conspiracy to defraud the IRS, evidence that defendant, who claimed to be an independent contractor conducting seminars to promote the tax consultation/preparation and audit representation services of a California company, effectively controlled the California company, told seminar participants how to convert personal expenses into business expenses (such as deducting a cat as a "rodent control device," dog food expenses as a "security device," or a parakeet as "aerial surveillance") and instructed one client to create a phony invoice to support a $1,275 deduction, was sufficient to support conviction.

5. United States v. Two Eagle, 318 F.3d 785 (8th Cir. 2003). An example of how parties take up the court's time requiring it to state the obvious. Isn't it comforting to know that in this Circuit broken legs and a gunshot to the ear, nearly splitting it in half, qualify as "serious bodily injury?"

B. Procedure

1. Clay v. United States, ___ U.S. ___, 123 S. Ct. 1072 (2003). The one-year limitation period of § 2255 begins running upon expiration of the time period for filing a petition for certiorari from a decision of a court of appeals affirming a conviction.

2. United States v. Kamerud, ____ F.3d ____, 2003 WL 1918227 (8th Cir. April 23, 2003). Indictment which recited the statutory penalty provision for proof of 50 grams or more of methamphetamine was not defective where defendant was charged with and convicted of a conspiracy which involved in excess of 500 grams; there is no prejudice resulting from "over proof." Trial which commenced the same day defendant was arraigned on superceding indictment did not violate the Speedy Trial Act, particularly where defendant did not request a continuance and did not demonstrate how counsel was unprepared for trial.

3. United States v. Ferro, 321 F.3d 756 (8th Cir. 2003). Order determining defendant was incompetent to stand trial and committing him to custody of Attorney General for treatment for reasonable period was mandated, even though defendant's prognosis was that his condition (dementia secondary to a stroke) was incapable of being improved.

C. Search and Seizure

1. United States v. Francis, ____ F.3d ____, 2003 WL 1956153 (8th Cir. April 28, 2003). Search of house following house fire for source of fire, during which evidence of meth lab on premises was found in plain sight, justified warrantless search based on exigent circumstances.

2. United States v. Johnson, ____ F.3d ____, 2003 WL 1948832 (8th Cir. April 25, 2003). Where three uniformed officers stood closely to defendant and took his driver's license while conducting a brief interrogation, an investigative seizure occurred; however, it was justified based on the officer's perception (perhaps mistaken) that a woman to whom defendant had been talking by yelling and using profanity appeared to be frightened. Defendant's subsequent flight gave officers further cause to chase and subdue on suspicion defendant might be carrying a weapon (which he was).

3. United States v. Kuenstler, ___ F.3d ___, 2003 WL 1873308 (8th Cir. April 15, 2003). Exigent circumstances to search house existed where defendant, for whom officers had an arrest warrant, resisted arrest, a woman came from the house screaming threats at the officers, another person was watching from the doorway and officers were aware there could be a drug lab in the house -- any ulterior motive to find the lab did not render the search invalid where officers otherwise had "objectively reasonable safety concerns."

4. United States v. Walker, 324 F.3d 1032 (8th Cir. 2003). Probable cause for anticipatory search warrant of residence (where package containing over a kilogram of cocaine was to be delivered) was found in contents of package and officer's experience concerning drug traffickers' habits to keep cash and guns on the premises.

5. United States v. Wallace, 323 F.3d 1109 (8th Cir. 2003). During search of premises of ambulance service company being investigated for submitting fraudulent Medicare/Medicaid claims, employees were allowed to use restrooms, take smoke breaks, go to lunch or shopping, although initially they were directed to move away from their desks by agents entering the building. Where only one agent using a preprinted questionnaire interviewed defendant in an employee lounge, without physical restraint or placing defendant under arrest, Miranda warning was not required and defendant's statements should not have been suppressed in subsequent prosecution.

6. United States v. Collins, 321 F.3d 691 (8th Cir. 2003). Officers responding to a "shots fired" call who found a vehicle containing slumped-over occupants in the vicinity could lawfully lean into vehicle to determine whether any of the occupants had been injured -- discovery of handgun which was sticking out of defendant's pocket was then in plain view and lawfully seized.

D. Due Process/Evidence

1. Demore v. Kim, ____ S. Ct. ____, 2003 WL 1960607 (April 29, 2003). Pre-removal-hearing detention of deportable criminal aliens pursuant to 8 U.S.C. § 1226(c) without finding of risk of flight or danger to the community does not violate due process, particularly since period of detention has is for limited time period.

2. United States v. Munoz, 324 F.3d 987 (8th Cir. 2003). Although videotape of post-Miranda interview of defendant was of poor quality, where it was "audible and intelligible" and otherwise met the seven foundational requirements of United States v. McMillan, 508 F.2d 101, 104 (8th Cir. 1974), trial court did not abuse discretion in admitting it into evidence.

3. United States v. Schnapp, 322 F.3d 564 (8th Cir. 2003). Where defense counsel could have asked witness about alleged prior inconsistent statement while witness was on stand during cross-examination, it was not an abuse of the court's discretion to disallow defendant's subsequent testimony concerning the alleged statement even though government could have recalled witness.

4. United States v. Collins, 321 F.3d 691 (8th Cir. 2003). A case which demonstrates that the "right to confront and cross-examine witnesses" is not equivalent to the "right to employ leading questions" -- here the trial court's refusal to allow counsel to cross-examine witness with leading questions was not an abuse of the court's discretion.

5. United States v. Conrad, 320 F.3d 851 (8th Cir. 2003). Prosecutor's comments regarding the purpose of the gun control statute during both opening statement and closing argument and statements elicited from ATF agent concerning statutory purpose were improper and prejudicial, even with curative actions by the trial court, necessitating new trial.

6. United States v. Yockel, 320 F.3d 818 (8th Cir. 2003). Because bank robbery is a general intent crime, evidence of defendant's mental history was irrelevant (he did not rely on an insanity defense); that defendant did not display or make reference to a weapon but told a bank teller "If you want to go to heaven, you'll give me the money" was sufficient evidence of intimidation.

7. United States v. Redd, 318 F.3d 778 (8th Cir. 2003). In the context of a supervised release revocation hearing, where the Federal Rules of Evidence do not apply, trial court did not err in admitting written test reports of six separate sweat patch analyses where in the admissibility balancing test which applied, the value of any possible testimony from the out-of-state lab technicians did not outweigh the expense and inconvenience of bringing the witnesses from California and the test reports were reliable as they were the "regular reports of a company whose business it is to conduct such tests."

E. Sentencing

1. Ewing v. California, ___ U.S. ___, 123 S. Ct. 1179 (2003). California's "three strikes law" mandating life imprisonment upon a third felony conviction withstands Eighth Amendment "cruel and unusual punishment" challenge.

2. United States v. Thornberg, ___ F.3d ___, 2003 WL 1961033 (8th Cir. April 29, 2003). Defendant's past history included a previous federal conviction for seventeen counts of mail fraud, failure to appear in the courts of two states on charges of grand theft/embezzlement and gross misdemeanor theft respectively, associations with numerous failed businesses owning millions of dollars, operation of a fraudulent foundation shut down by authorities, a claim of PTSD from a non-existent military history and use of false social security numbers and aliases. The present charges brought against him (and five different a/k/a's) included one count of conspiracy, seven counts of mail fraud, five counts of wire fraud and nine counts of money laundering. The government was willing to dismiss twenty different counts in exchange for a plea to one count of wire fraud and one count of money laundering and to recommend an acceptance of responsibility reduction. When a PSR revealed a past battery conviction, defendant told the probation office it had been dismissed following his completion of an anger management course, proof for which he provided a letter from a psychologist and certificate of course completion, both falsified by the defendant. His sentence enhancement for obstruction of justice, among other things, was significant.

3. United States v. Rojas-Madrigal, ___ F.3d ___, 2003 WL 1956156 (8th Cir. April 28, 2003). District court retains discretion to grant a statutory safety valve deduction from a mandatory minimum sentence, even when a sentencing hearing has been continued, where the court found it would be in the interests of justice to allow further debriefing of defendant before coming to a final determination on sentence.

4. United States v. Alarcon-Garcia, ___ F.3d ___, 2003 WL 1956146 (8th Cir. April 28, 2003). Defendant who was untruthful concerning co-defendant's participation in drug conspiracy (co-defendant had been separately tried and convicted) and whose statements concerning the involvement of another individual as a source of drug sales at one site was contradicted by evidence that individual had left the state before some of the drug sales was not entitled to a safety valve reduction.

5. United States v. Fields, 324 F.3d 1025 (8th Cir. 2003). Defendant who pled guilty to charge of selling child pornography over the internet challenged the conditions of his release which prohibited him from owning or operating photographic equipment or computers for photographic use, or having internet service in his residence, as being unconstitutionally vague and violative of the Eighth Amendment Cruel and Unusual Punishment clause. Conditions held to be reasonably related to the factors for supervised release and were no greater than necessary-- he was able to use and possess a computer with the permission of his probation officer.

6. United States v. Harris, 324 F.3d 602 (8th Cir. 2003). Section 5G1.3(b) in the Sentencing Guidelines (which indicates a federal sentence will run concurrently with any prior sentence) only applies "when a defendant has been sentenced in state or federal court for the same criminal conduct or for criminal conduct necessarily included in the later federal charges." As a footnote (literally), defendant (who committed a federal offense while on state parole) withdrew from a plea agreement in which the government stipulated to concurrent sentences; the district court subsequently ordered his federal sentence to run consecutive to a state sentence.

7. United States v. Blahowski, 324 F.3d 592 (8th Cir. 2003). Amendment to Sentencing Guidelines did not affect holding of United States v. Hascall, 76 F.3d 902 (8th Cir. 1996), that burglary of a commercial building is a "crime of violence."

8. United States v. Johnson, ____ F.3d ____, 2003 WL 1786662 (8th Cir. April 4, 2003). Crime of theft from the person of another is a "crime of violence" under Sentencing Guidelines; because of corresponding offense level obtained, reduction for possession of firearms "solely for lawful sporting purposes" was not applicable.

9. United States v. Hart, 324 F.3d 575 (8th Cir. 2003). Defendant's failure to keep records of commission checks received by his corporation was not "sophisticated means" sufficient to justify sentencing enhancement after defendant pled guilty to one count of income tax evasion, particularly where defendant provided corporation's tax identification number to company which paid commissions and that company reported all payments -- no concealment could be found from these circumstances as government had notice of potential offense through receipt of 1099's from paying company and lack of tax returns from receiving company.

10. United States v. Touche, 323 F.3d 1105 (8th Cir. 2003). In revoking defendant's supervised release and sentencing him to fifteen months in prison (which sentence exceed the suggested range), court did not abuse its discretion -- Ch. 7 of the Sentencing Guidelines are only policy statements or "non-binding recommendations" to courts considering sentences for violation of conditions of supervised release.

11. United States v. Calderon-Avila, 322 F.3d 505 (8th Cir. 2003). Sentence of defendant who lied about his age and got his sister to lie about the subject was properly enhanced for obstruction of justice and also properly not reduced for acceptance of responsibility in light of the obstructive conduct.

12. United States v. Kessler, 321 F.3d 699 (8th Cir. 2003). Sentence of defendant in methamphetamine conspiracy case was properly enhanced for commission of perjury/obstruction of justice when defendant testified as the physical and testimonial evidence which directly linked defendant to the conspiracy was extensive.

13. United States v. Thin Elk, 321 F.3d 704 (8th Cir. 2003). Defendant was charged with assault resulting in serious bodily injury and involuntary manslaughter following a deadly head-on car accident. Where psychological injury to the surviving victim was relied on for both a six-level increase and an upward departure under the guidelines, what appeared to be double counting was permissible: district court made detailed findings concerning victim's severe depression, loss of spouse of fifty-three years, aggravation of what had been the beginning stages of dementia, all of which supported the court's discretion in finding presence of psychologic injury to an exceptional degree.

F. Habeas

1. Massaro v. United States, ___ S. Ct. ___, 2003 WL 1916677 (April 23, 2003). Defendant is not required to bring an ineffective assistance of counsel claim on direct appeal from federal conviction and may bring it for the first time in § 2255 proceeding. This does not preclude defendant from raising ineffective assistance issues on direct appeal where record permits.

2. Woodford v. Garceau, ___ U.S. ___, 123 S. Ct. 1398 (2003). A habeas case is not "pending" under the rule of Lindh v. Murphy, 521 U.S. 320 (1997)(which applied the amendments to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to cases pending on the effective date of the Act), until the application for writ of habeas corpus is filed; therefore, where motion for appointment of counsel/stay of execution was filed before the effective date of AEDPA but actual application for writ was not filed until after AEDPA's effective date, the application was subject to AEDPA's amendments.

3. Lockyer v. Andrade, ___ U.S. ___, 123 S. Ct. 1166 (2003). In assessing whether a state court's decision was an unreasonable application of clearly established federal law under 28 U.S.C. §2254(d)(1), "objectively unreasonable" does not mean "clear error" -- for example, if a legal principle is applied to a set of facts which differ from those of the case in which the legal principle is announced. Here, the contours of sentence proportionality analysis are not clear and the state court's determination fit within those contours which existed.

4. Miller-El v. Cockrell, ___ U.S. ___, 123 S. Ct. 1029 (2003). In denying a certificate of appealability under 28 U.S.C. § 2253, the appellate court failed to give threshold consideration to defendant's Batson argument based on prosecutorial strikes of ten out of eleven eligible African-American jurors -- all defendant had to show what that reasonable jurists could disagree with how the district court resolved his case.

5. Lomholt v. Iowa, ___ F.3d ___, 2003 WL 1961035 (8th Cir. April 29, 2003). Use of "sequestered, closed-circuit testimony from" child victims of defendant's sexual abuse did not violate Sixth Amendment confrontation rights.

6. Moore v. Kinney, 320 F.3d 767 (8th Cir.), petition for cert. filed (April 14, 2003)(No. 02-10093). Resentencing court's definition of "exceptional depravity" aggravator under Nebraska's death penalty statute to include calculated planning of death based on a specific victim characteristic (here on the basis of age) was not an unreasonable application of federal law -- see Justice Heaney's lengthy dissent over the due process implications of this decision.

7. Singleton v. Norris, 319 F.3d 1018 (8th Cir. 2003). Mandatory administration of antipsychotic medication to prisoner sentenced to execution and execution of medicated prisoner do not violate the Eighth Amendment. The mandate in this case has been stayed as of March 4, 2003 pending filing of a petition for writ of certiorari.

III. CIVIL RIGHTS

A. First Amendment

1. Meyers v. Nebraska Health and Human Services, 324 F.3d 655 (8th Cir. 2003). Reassignment of case worker from "ongoing treatment" to "intake" position as a result of admittedly protected speech concerning a foster care placement presented a jury question whether the reassignment was a significant and material change in her employment conditions, one of the elements of her retaliatory discharge claim.

2. State of Missouri v. American Blast Fax, Inc., 323 F.3d 649 (8th Cir. 2003). Hurray for anti-spam legislation! A statute restricting unsolicited commercial fax advertisements does not violate the First Amendment.

B. Fourth Amendment

1. Johnson v. Crooks, _____ F.3d _____, 2003 WL 1918222 (8th Cir. April 23, 2003). Irrespective of an admitted factual dispute concerning whether plaintiff crossed the center line while driving, officer who stopped her to determine if she was able to travel and then let her go with a warning was entitled to qualified immunity as the stop did not violate the Fourth Amendment; as a matter of law the officer's conduct was objectively reasonable. Judge Lay dissents with a concern that an incorrect summary judgment standard was applied.

2. Crumley v. City of St. Paul, 324 F.3d 1003 (8th Cir. 2003). Attorney who was arrested after she attempted to give a business card to passenger of a vehicle stopped for an equipment violation brought civil rights action claiming she was arrested without probable cause and subjected to excessive force. Although she was acquitted of offense of obstruction of legal process in state court, this finding was irrelevant to the issue whether there was probable cause to arrest the attorney and she was collaterally estopped from relitigating the legality of her arrest. With respect to the use of force claim, officer's conduct in pushing attorney away from the car, coupled with her defensive move away which the Circuit construed as resistance, supported a finding the use of force was reasonable, as was handcuffing her hands so tightly one of her hands bled. As a matter of law, injuries were too minor to support an excessive force claim.

3. King v. Fletcher, 319 F.3d 345 (8th Cir. 2003). Where there were factual issues concerning whether consent had been given to inspect vehicle VIN's, whether vehicles had missing or mismatched VIN's, police were not entitled to qualified immunity.

C. Due Process

1. Connecticut Dept. of Public Safety v. Doe, ___ U.S. ___, 123 S. Ct. 1160 (2003). State law ("Megan's Law") requiring convicted sex offenders to register with the Department of Public Safety upon release, which information is then posted on an internet website, does not violate procedural due process -- no hearing regarding an offender's current danger to the community status is required as such a finding is not material under the statute.

2. Golden v. Anders, 324 F.3d 650 (8th Cir. 2003). Conduct of school principal in grabbing a sixth grade student (who had been kicking a vending machine) by the neck and collar, taking him out of the building, throwing him onto a bench, then holding him down on the bench when he tried to get up did not satisfy the "shock the conscience" standard and thus did not violate student's substantive due process rights.

D. Ex Post Facto Clause

1. Smith v. Doe, ___ U.S. ___, 123 S. Ct. 1140 (2003). Statute which required released sex offenders to register with local law enforcement authorities and provide updated information did not violate the *Ex Post Facto* Clause as applied to offenders sentenced before the statute was enacted as the statute is nonpunitive.

## IV. LABOR AND EMPLOYMENT

### A. Age Discrimination

1. Mayer v. Nextel West Corp., 318 F.3d 803 (8th Cir. 2003). In spite of finding plaintiff had established a prima facie case and perhaps set forth pretext evidence, Eighth Circuit rejected argument that younger manager's order to plaintiff to hire the "right" people, meaning those with two to six years of experience, was evidence of age-based animus in absence of any other evidence.

### B. Disability Discrimination

1. Clackamas Gastroenterology Associates, P.C. v. Wells, ____ S. Ct. ____, 2003 WL 1906297 (April 22, 2003). In counting the number of employees to determine whether an employer is covered by the ADA (15 or more employees for 20 weeks), courts are directed to look to the common-law element of control to determine whether director-shareholders of professional corporation are countable as employees.

2. Fenney v. Dakota, Minnesota & Eastern RR Co., ___ F.3d ___, 2003 WL 1956138 (8th Cir. April 28, 2003). Evidence that plaintiff's limited use of right hand and arm following a work-related accident required him to need additional time to bathe/dress/shave/have a meal and drive himself to work precluded summary judgment on the issue of whether he was substantially limited in a major life activity. Circuit also recognized cause of action for "constructive demotion" which requires proof that an individual found a work environment abusive and that "an objective person in his position would have felt that he had to demote himself because of his discriminatory work conditions."

3. Mitchell v. Iowa Protection and Advocacy Services, __ F.3d ___, 2003 WL 1873307 (8th Cir. April 15, 2003). Plaintiff could not show a dispute with her supervisor concerning her belief the agency was discriminating among program applicants was causally connected to her termination from employment two days later, particularly where there was no evidence supervisor had any role in budget decision which ended plaintiff's employment or that decisionmakers had any knowledge of the dispute.

4. Alexander v. The Northland Inn, 321 F.3d 723 (8th Cir. 2003). Plaintiff who was terminated as hotel housekeeping supervisor was not victim of disability discrimination when she could not perform an essential function of her job, vacuuming, from which her physician restricted her. Hotel was not required to assign those duties to other employees indefinitely as reasonable accommodation.

C. Sex, Race, National Origin Discrimination

1. Meriwether v. Caraustar Packaging Co., ___ F.3d __, 2003 WL 1894608 (8th Cir. April 18, 2003). A single "grabbing" incident coupled with an encounter wherein co-worker joked about grabbing was insufficient to demonstrate severe or pervasive conduct. Further, employer took immediate and appropriate action in response to plaintiff's complaint, suspending co-worker for two days, then an additional five days, requiring sexual harassment training and warning of future termination if an additional incident occurred. Finally, attorney fee award to defendant as prevailing party was supported by finding that plaintiff's deposition testimony contradicted many of the allegations of her verified complaint and was also inconsistent with her EEOC complaint.

2. Hannoon v. Fawn Engineering, 324 F.3d 1041 (8th Cir. 2003). Supervisor's confrontation with plaintiff concerning his body odor was not suggestive of discrimination based on race or national origin, nor were criticisms of plaintiff's leadership skills or a request to one of plaintiff's subordinates to "translate" a technical e-mail.

3. Alagna v. Smithville R-II School District, 324 F.3d 975 (8th Cir. 2003). After female teacher interviewed a male co-worker concerning his personal problems as part of the practicum for her master's degree in psychology, the co-worker continued to call her about his personal problems, stopped in her office frequently, stopped her in the hallway to talk, gave her unsolicited gifts, made comments such as "I love you" and "you are very special," but never discussed sexual activities or propositioned her. After she complained to school officials, the co-worker was warned about his conduct, but the activities would begin again after a period of time. [As a side note, the co-worker conducted himself the same way with other female and male teachers, but that conduct was not considered in the Court's ultimate ruling.] Male co-worker eventually resigned, but plaintiff resigned anyway. The Eighth Circuit found the conduct was not sufficiently severe or pervasive to support a claim of hostile work environment sexual harassment/constructive discharge, describing the co-worker's conduct as evidencing "a troubled individual, insecure, depressed, and in need of constant reassurance of his worth as a human being."

4. Gilmore v. AT&T, 319 F.3d 1042 (8th Cir. 2003). Plaintiff failed to establish a prima facie case of racially discriminatory termination from employment where the eight individuals she identified as comparators were not similarly situated: three were from same protected group; the conduct of another three was not comparable in severity to plaintiff's problems; the supervisor administering discipline to another individual was not identified; and different supervisors administered discipline to the last individual.

5. Diaz v. Swift-Eckrich, Inc., 318 F.3d 796 (8th Cir. 2003). Genuine issues of material fact existed concerning national origin hostile work environment claim where co-workers constantly made remarks concerning Hispanics, about which plaintiff made complaint to supervisors.

V. MISCELLANEOUS

A. Contracts

1. General Trading Int'l, Inc. v. Wal-Mart Stores, Inc., 320 F.3d 831 (8th Cir. 2003). In contract dispute concerning what turned out to be "scary-looking" vine reindeer purchased for resale during the Christmas season, "merchants' exception" to the statute of frauds, whereby confirmatory writing setting out terms of agreement is sufficient if no written objection thereto is received within ten days, was not satisfied by exchange of e-mails where replies discussed different terms and made demands for payment.

2. Olander v. State Farm Mut. Auto. Ins. Co., 317 F.3d 807 (8th Cir. 2003). Language of an insurance agency agreement regarding termination of relationship which did not specify grounds for termination other than the death of the agent is interpreted as being terminable at will; horatory language in preamble concerning "full and faithful observance and performance of the obligations and responsibilities" in contract did not create ambiguity in subsequent termination provision.

B. Full Faith and Credit

1. Franchise Tax Bd. of California v. Hyatt, ___ S. Ct. ____, 2003 WL 1916238 (April 23, 2003). State of Nevada was not required to give full faith and credit to California's sovereign immunity statute with respect to intentional tort claims where Nevada's statute did not provide immunity for such claims.

C. IOLTA

1. Brown v. Legal Foundation of Washington, ___ U.S. ___, 123 S. Ct. 1406 (2003). Although law requiring interest on IOLTA funds be paid to foundation providing legal services for the needy could be a *per se* taking requiring "just compensation" to the client whose funds are so deposited, where funds qualifying for deposit in an IOLTA account would otherwise generate no net earnings, there is no violation of the Just Compensation Clause.

D. Torts

1. Norfolk & Western Railway Co. v. Ayers, ___ U.S. ____, 123 S. Ct. 1210 (2003). FELA claimant suffering from work-related asbestosis may recover damages for mental anguish attributable to fear of developing cancer.

2. Bergfeld v. Unimim Corp., 319 F.3d 350 (8th Cir. 2003). Lockheed, which provided silica sand to plaintiff's employer for use in making molds and cores in its foundry did not have a duty to warn the employer about the dangers of exposure to silica dust where the employer was a sophisticated user; employer's failure to adopt applicable NIOSH standard regarding silica dust did not prove lack of knowledge of standard.

E. Trademarks

1. Moseley v. V Secret Catalogue, Inc., ___ U.S. ___, 123 S. Ct. 1115 (2003). In trademark dilution lawsuit, that consumers might mentally associate store named "Victor's Little Secret" with the more famous mark "Victoria's Secret" does not establish actionable dilution where the marks at issue are not identical.